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IN THE

Supreme Court of the United States

October Term, 1967
No. 1244

DEWEY WILSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

The Petition of Dewey Wilson, a Negro, for Writ of Certiorari to the State of California and Its Courts Respectfully Shows:

1. Reference to the Official Reports of the Case.

Reference to the Official Reports of the case are as follows: *People v. Wilson,* 256 Advance California Appellate Reports 458; 64 Cal. Rptr. 172. A copy of such opinion is hereto appended as Appendix "A". A petition for hearing in the Supreme Court of California was denied by said court without opinion on the 24th day of January 1968; minutes of said court, page 3 of minutes, in 68 Advance California Reports No. 4 are as follows:

> "(2d Crim 13166, Div 4)—People v. Wilson. [256 A.C.A. 458.] Mosk, J, did not participate. Appellant's petition for hearing denied. Sullivan J., is of the opinion that the petition should be granted."

2. Grounds on Which the Jurisdiction of the Court Is Invoked.

The grounds on which the jurisdiction of this court is invoked are as follows:

(a) The date of the judgment sought to be reviewed and the time of its entry is November 27, 1967.

(b) The date of an order of the California Court of Appeals denying a rehearing is December 15, 1967.

(c) The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U.S. Code Ann., § 1257, and Rule 38½ of the Rules of the Supreme Court of the United States.

3. The Questions Presented for Review.

(a) Whether mere presence in the premises where contraband was found, absent any evidence of the knowledge of its existence, its presence, and of its narcotic character, and absent all evidence of any possession of, dominion over, or control over the contraband, is sufficient, within the Constitution of the United States under the doctrine of *United States v. Romano,* 38 U.S. 136, 15 L. Ed. 210, 86 S. Ct. 279, and cases therein cited, to sustain a conviction as based upon due process of law.

(b) Whether the California Courts in their decisions based upon the facts, lacking such evidence as stated above accorded Wilson due process by holding:

> "[15-17] Here defendant Wilson was in apparent possession of the apartment where the major part of the heroin was found, his automobile was being used to make a delivery of heroin, and he told con-

tradictory and somewhat ingenuous stories to account for large expenditures of funds while in places where the heroin could well have been purchased. It is true that the affidavit on which the search warrant issued had claimed that Charlene [a co-defendant who had pleaded guilty] possessed some heroin before Wilson's arrival, and that he had an explanation for all of the incriminating facts. But the jury was not required to believe him, and it was its function, and not ours, to weigh the conflicting evidence and the inferences to be drawn therefrom. We cannot say that its verdict was without support." (64 Cal. Rptr., Page 177.) [bracketed material ours.]

(c) Whether the doctrine of guilt by association can be applied, as it was here, to hold a defendant guilty of a felony under the United States and California Constitutions.

(d) Whether the requirements of due process were met by the admission into evidence of the contraband with no foundation save mere innuendo to connect the contraband with the petitioner, as here.

4. The Constitutional Provisions Relied On.

(a) The Fifth Amendment to the United States Constitution, U.S. Code Ann., Const., Amendments 1 to 5, page 297.

(b) The Fourteenth Amendment to the Constitution, U.S. Code Ann., Const., Amendments, 6 to 14, Page 288.

(c) The Thirteenth Amendment to the Constitution, U.S. Code Ann., Const., Amendments 6 to 14, Page 269.

This Court has stricken down a statute of Congress authorizing an inference of guilt of possession from the defendants' unexplained presence at the site of a still on the ground that it violated the due process clause of the Fifth Amendment.

See *United States v. Frank Romano*, 382 U.S. 136, 15 L. Ed. 2d 210; 86 S. Ct. 279. This doctrine was developed by the court in the cases of *United States v. Gainey*, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754; *Tot v. United States*, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 and *Bozza v. United States*, 330 U.S. 160, 91 L. Ed. 818, 67 S. Ct. 645.

In *Tot v. United States*, 319 U.S. 463, 876 L. Ed. 1519, 63 S. Ct. 1241, the court stated:

> "But due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a State Legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated."

Also:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience".

And:

> "But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing procedure of courts."

Here, we submit, it is not competent for courts, either under Legislature-created rules or otherwise, to accept such strained inferences, and that the conviction, of Dewey Wilson rests entirely upon irrational, and non-experiential inferences.

5. Statement of the Case.

(a) A search warrant was issued by a Los Angeles judge on May 31, 1963, based upon an affidavit by a police officer (attached to Appendix "A"): "that there is *now* in the possession of Charlene Petersen aka Charlene Merritt on the premises located at and described as 240 West 113th Street, Los Angeles, California . . . and in a vehicle described as a 1962 Ford Fairlane . . . and on the person of Charlene Petersen aka Charlene Merritt, the following personal property, to-wit: heroin." (Emphasis ours.)

On that same date, May 31, 1963, the Hong Kong Bear, a trans-Pacific ship on which Dewey Wilson was a steward, arrived in the San Francisco Bay; Wilson was aboard and did not leave the ship until late that afternoon or the next day. He stayed in the San Francisco area until Thursday of the next week, which was June 7, 1963; he drove to Los Angeles, arriving at night and telephoned his niece Charlene Petersen and became a guest in her home. On June 8, 1963, at about 4:30 P.M., the officers arrived with a search warrant to search Charlene's residence, her person and her Ford automobile. The Ford was blocked in the driveway by Dewey Wilson's 1960 Chevrolet. The of-

ficer placed the residence under surveillance. About 6:00 P.M. Charlene left driving the Chevrolet; the police followed; she looked over her shoulder, dropped her right hand from the steering wheel to the floor, then put both hands on the wheel. On arrest, the officers found two condoms of heroin under the front seat; Charlene's conduct in the automobile was furtive and suspicious.

The officers thereafter went to Charlene's residence, knocked, and Dewey Wilson opened the door. Wilson was sitting in the living room watching TV; the officer identified himself and exhibited the search warrant. In a broom closet at the rear of the house in a service porch area, the officer found a bag containing 42 condoms of powder and in the closet measuring spoons, empty balloons, condoms and a portion of a newspaper bag and a condom containing powder. The powder was heroin.

Wilson has no past record; is in his fifties with over 30 years service at sea. On the trip of the Hong Kong Bear to the Orient, he drew some $800.00 or $900.00 and had $700.00 of $800.00 undrawn wages at the times of docking.

His ship had visited oriental ports in the regular course of its trips. There is no other evidence in anywise tending to connect the heroin with Dewey Wilson or to show that he had or ever had had any possession of it, any control over it, any dominion over it ,or any knowledge of the narcotic character of the powder that was found secreted in the service porch closet.

6. Stages of Proceedings Where Federal Question Raised.

(a) In the trial court upon an objection to the introduction of the contraband into evidence against the petitioner alone; it was there argued that this was proscribed by the doctrine of the *Romano* case. Counsel argued:

> "I cite also a very recent case from the United States Supreme Court on the possession of another type of contraband; and the statute there very clearly was one for making culpable the possession of the contraband. It is the case of the United States versus Romano, 15 Lawyer's Edition 2d, 210. In that case the Court held that the absence of any showing of possession or control or dominion on the part of the defendant is fatal to the People's case.
>
> "I submit that is exactly what we have here, an absnce of any showing of dominion or control or possession or knowledge on the part of the defendant Dewey Wilson."

And again at the close of the trial, the defense moved to strike all of the exhibits comprised of the contraband on the same grounds, as follows:

> "Mr. Maury: The defense moves at this time first to strike all of the exhibits to which objections have heretofore been made, namely, exhibits, I believe, 1, 2, 3 and 4 [the contraband]—5 we do not object to. It's over his signature—on the same grounds as heretofore interposed at the time of the motions, that there is no connective tissue, no evidence whatsoever in any wise to connect Dewey

Wilson with the possession of the contraband, that the whole case of the People is based on surmise, conjecture and the unhappy, fortuitous circumstance that Dewey Wilson happened to be present at the time of the arrest." [bracketed material ours.]

(b) In the California Appellate Court, in Wilson's Opening Brief the 7th Specifications of Error and the 16th Specifications of Error are as follows:

"7. The court erred in admitting into evidence without foundation and without any connection thereof with DEWEY WILSON, all of the Exhibits designated 1, 2, 2-a, 2-b, 2-c, 2-d, 2-a-1 and 4, R-314, et seq."

And:

"16. The court so erred throughout the trial that the entire proceedings constituted a denial of due process to the defendant DEWEY WILSON under the Fifth Amendment to the Constitution of the United States, under the Fourteenth Amendment to the Constitution of the United States and under Article I, Section 13 of the California State Constitution."

These specifications were elaborated on in the briefs. In each, the Superior Court, being the court of first instance and the Appellate Court, the state courts paid no attention whatsoever to the assertion that the proscriptions of the Federal Constitution were involved; the trial court brushed aside the objection and denied the motion to strike and the Appellate Court in its opinion (First Appendix) *made no mention whatsoever of these specifications of error or of the argument in support thereof contained in the brief.*

7. Conclusion.

It is submitted that the writ of certiorari should issue.

Respectfully submitted,

GEORGE R. MAURY,
Attorney for Petitioner Dewey Wilson.

GEORGE R. MAURY AND
JAMES T. DAVIS.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

The People, Plaintiff and Respondent, vs. Dewey Wilson, Defendant and Appellant. Crim. No. 13166.

Filed Nov. 27, 1967.

APPEAL from a judgment of the Superior Court, Los Angeles County, Walter R. Evans, Judge. Affirmed.

Judgment of conviction of violation of section 11500.5 of the Health and Safety Code, a felony, affirmed.

George R. Maury and Rob R. Schuyler for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Bradley A. Stoutt, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and his niece, Charlene Peterson, were charged with unlawfully possessing heroin for sale. (Health & Saf. Code § 11500.5.) In count II, only Charlene Peterson was charged with another violation of the same section. Defendant and the codefendant were convicted but the judgments were reversed on appeal.[1] The matter was set for retrial. Pursuant to Penal Code sections 1539 and 1540, each moved to quash the search warrant which had been issued for a search of

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[1]The judgment was reversed for failure to allow defendants to traverse the affidavit on which the warrant was issued. (*People v. Peterson* (1965) 233 Cal.App.2d 481.) As we point out, at the second trial the court conducted a full hearing on that issue; we review its determination in this opinion.

Charlene and her residence. After a hearing the motions were denied. Trial was by jury and defendant was found guilty as charged. Defendant's motion for new trial was denied, probation was denied, and defendant was sentenced to prison for the term prescribed by law. He has appealed; we affirm the judgment.

On June 8, 1963, at about 4:30 p.m., Officer James Grennan, of the Los Angeles City Police Department, accompanied by four other officers, went to the residence of Charlene Peterson. The officers had a search warrant to search her residence, her person, and her 1962 Ford automobile. The Ford was in the driveway and its path was blocked by a 1960 Chevrolet belonging to defendant. The officer placed the residence under surveillance.

About 6:00 p.m., Charlene left, driving the Chevrolet. Officer Grennan followed her. She looked over her shoulder, dropped her right hand from the steering wheel to the floor, then put both hands on the wheel. The officer arrested Charlene, searched the car, and found two condoms of heroin under the front seat. The officer testified that Charlene's conduct in the automobile was furtive and suspicious. The officer also testified that, sometime between 4:30 and 6:00 p.m., prior to these events, he had conversed with "a person" who said he had ordered two ounces of heroin from Charlene "to be delivered in the hour."

The search warrant had been issued on May 31, 1963, on the basis of an affidavit of Officer Grennan. That affidavit[2] alleged that there was, then (*i.e.*, on May 31st) in the possession of Charlene, on her person,

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[2]The full affidavit is set forth in the appendix to this opinion.

at her residence and in her Ford automobile, a quantity of heroin. As a basis for the officer's belief, the affidavit alleged information from several sources, some claimed to be tested and some not tested, that Charlene was engaged in the sale of heroin, delivered by automobile from a supply kept at her residence and that Charlene received her supply by ship from the Orient every three or four months and had just recently received such a shipment. In other testimony Officer Grennan stated that he had other information that the heroin allegedly on hand on May 31st was not yet ready for sale or distribution.

After Charlene's arrest, officers Grennan and Hanks, and other officers, went to Charlene's residence. They knocked and, according to Officer Grennan, Mr. Wilson opened the door. Officer Hanks testified that they entered through an unlocked front door; Mr. Wilson was sitting in the living room, and the officer identified himself and exhibited a search warrant.

A search was undertaken and, in a broom closet, they found a Sears Roebuck bag containing 42 condoms of heroin. On a shelf in the closet Hanks found measuring spoons, empty balloons, condoms and a portion of newspaper with a plastic bag and a condom containing powder. Officer Hanks, who had worked for the narcotics division for four or five years, formed the opinion that the heroin was packaged for sale. In Hanks' opinion, if the heroin recovered in the residence of Charlene Peterson was diluted to street percentage, the value would be around $1,000,000.

Dunzel Curtis, an expert forensic chemist, testified that the heroin did not come from Mexico, but that it

came from Europe or the Orient, and that it could have come from certain countries which defendant visited.

Defendant, as chief steward, sailed to the Far East several times a year. Defendant made five draws in salary at Okinawa, Formosa, Bangkok, and somewhere between Kobe and Yokohama. Defendant's earnings were $2,061.65, and at the end of the trip he had a total of $784.30 due him in salary. Defendant testified that, during his trip to the Orient, he purchased a tape recorder for $300, an art object for $25, and that he sent $200 home.

Defendant's boat docked in Oakland May 31, 1963. Members of the families of the crew would be given advance information as to the ship's arrival. Defendant went to Los Angeles on June 7, 1963. At about 11:00 p.m. he went to visit his niece. The next day, about 6:00 p.m., Charlene asked him to move his car out of her way, and defendant told her to use his car instead, since he was watching television.

Defendant denied ever smuggling narcotics. Defendant testified that three of Charlene's brothers were also seamen and that two of them worked for a line that went, among other places, to the Orient. Defendant did not have a copy of the cashier's check for the $200 he sent home from Okinawa. At defendant's former trial he was asked how much he drew "in any one port," and he said "it averaged $50 to maybe $200 in various ports." Defendant did not recall drawing the $300 until he heard it repeated when a witness testified. Defendant claimed he paid $300 in Yokohama for the tape recorder. At defendant's prior trial he testified that his room had been searched and at this trial he said no one searched the room. Defendant had listed

the tape recorder to customs at $90, but defendant explained that the actual cost was $300. He explained that he changed his testimony at his previous trial in regard to whether there was a search because he discovered that the search which he testified to earlier was not a contraband search. At the time of his first trial he did not know what a contraband search was. Defendant said that when he testified that no search had been made of his room in the case at bar he meant no *contraband* search, and not another type of search.

Defendant advances numerous errors on appeal. Defendant alleged that the motion to quash the search warrant under Penal Code sections 1539 and 1540 was improperly conducted; that the evidence is insufficient to support the verdict; that the prosecution failed to state a public offense in his opening statement; that the officer forced his way into the house and exhibited no warrant; that the court erred in its instructions; that there was misconduct of the prosecutor in his closing argument; and that there were numerous errors in evidence.

I

Defendant asserts that the 1539—1540 hearing was improper in that the magistrate held that the burden is on the defendant to go forward in contesting the warrant and that each side produce witnesses they wanted; defendant argues that the burden should have been put on the prosecutor. Defendant also asserts that the prosecutor had the duty of producing the informants as witnesses, and that the officer is not a "witness" under sections 1539 and 869.

It has been held that the burden of establishing the invalidity of a search warrant is upon the defendant.

(*Williams v. Justice Court* (1964) 230 Cal.App.2d 87, 97-98.)

We have set forth, in the appendix, the affidavit in question. Tested by the rules laid down by the United States Supreme Court, as those rules have been interpreted by the California courts,[3] the affidavit was sufficient. On appeal, the test is whether or not the magistrate could form a reasonable belief, based on the information contained in the affidavit, that the articles sought were present at the place or place to be searched. It is immaterial that the affiant (usually a police officer) does not have personal knowledge of the data included in the affidavit, so long as the affidavit discloses (a) that the officer's informant had personal knowledge of the facts related by him to the officer, and (b) that the officer's informant was a person on whose statements the magistrate was entitled to rely. Tested by those rules, the affidavit here was sufficient. We cannot say that the magistrate was in error in regarding the information given to him about the informants as enough to establish their credibility. Although some of the informants' statements concerning Charlene do appear to have been hearsay as to them, there was some information, given as the personal knowledge of at least two informants, to corroborate any hearsay from the other informant.

Since we hold that the warrant was valid, it follows that the search of the Chevrolet was lawful and the narcotics thus found admissible, quite apart from any question of the right of the officer to arrest Charlene

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[3]Consult, *inter alia: People v. Pineda* (1967) 253 Cal.App.2d .....[a]; *People v. Aguilar* (1966) 240 Cal.App.2d 502.

[a]253 A.C.A. 515.

because of her "furtive" conduct. The warrant authorized a search of Charlene's person. As we pointed out in *People v. Aguilar, supra,* 240 Cal.App.2d 502, 505, "Since it is an obvious impossibility to search the person of an individual without first taking him into custody, the warrant impliedly authorized an arrest as a step in the authorized search." With Charlene lawfully in custody, and with knowledge of conduct on her part which suggested a recent secretion of something in the car she was driving, a search of the car as part of the procedure was clearly proper.

In addition, the information previously given to the officers, together with Charlene's conduct when she realized that she was being followed, was itself sufficient to justify her arrest and the search that followed.

II

Defendant claims error on the theory that the officers forced their way into the apartment without exhibiting the warrant. Although, as above indicated, the two officers did not give exactly the same account of their entry, the jury could conclude that they entered with defendant's consent and that they did exhibit the warrant to him before the search began. The fact that Charlene had already been taken into custody destroyed neither the officers' rights under the warrant nor their right of entry, since they could well suspect that anyone in the apartment was likely to be involved in Charlene's operations.

III

Defendant contends that he was erroneously refused the opportunity to cross-examine Officer Grennan concerning statements in his affidavit. The purported pur-

pose was to show that the affidavit alleged that Charlene had already received a shipment of heroin on or before May 31st, at a time when defendant Wilson was still aboard his ship. These facts were obvious from the face of the affidavit itself and were developed during the trial; defendant suffered no prejudice from the ruling now complained of.

IV

Defendant objects that the opening statement of the district attorney failed to state a public offense. We know of no rule requiring the district attorney to state a public offense in his opening statement, nor is there any reason to have such a rule since defendant is fully appraised of the charge against him in other ways. In *People v. Mihaly* (1928) 95 Cal.App. 563, 565, defendant argued that the district attorney failed to state sufficient facts in his opening statement to show the commission of a crime. The court said the opening statements of counsel do not put a limitation on the right of either party to introduce evidence. In *People v. Stoll* (1904) 143 Cal. 689, 690, the court held that the opening statement of the district attorney is not evidence for any purpose nor conclusive as to the presentation of evidence not stated, and an instruction to the jury to find a verdict for defendant on such opening statement is void. Indeed, a prosecutor is not even required to make an opening statement. (*People v. Lopez* (1949) 93 Cal.App.2d 664, 667.) We believe that the logical conclusion based on the reasoning of these cases is that the prosecutor need not state a public offense in his opening statement.

V

Defendant's assertion that the evidence is insufficient to support the verdict is not well taken.

The elements of the crime at Bench require that the defendant exercise dominion and control over the narcotic, have knowledge of the narcotic's presence, and knowledge that the material was a narcotic. (*People v. Groom* (1964) 60 Cal.2d 694, 696.) Constructive possession is all that is necessary, and this may be proved by circumstantial evidence. (*People v. Luke* (1965) 233 Cal.App.2d 793, 796; *People v. Flores* (1957) 155 Cal. App.2d 347.) To show knowing possession of narcotics, the conduct of the parties, admission and contradictory statements and explanation are frequently enough. (*People v. Hokuf* (1966) 245 Cal.App.2d 394; *People v. Ortiz* (1960) 185 Cal.App.2d 622, 624; *People v. Torres* (1950) 98 Cal.App.2d 189; *People v. Foster* (1953) 115 Cal.App.2d 866.)

Here defendant Wilson was in apparent possession of the apartment where the major part of the heroin was found, his automobile was being used to make a delivery of heroin, and he told contradictory and somewhat ingenuous stories to account for large expenditures of funds while in places where the heroin could well have been purchased. It is true that the affidavit on which the search warrant issued had claimed that Charlene possessed some heroin before Wilson's arrival, and that he had an explanation for all of the incriminating facts. But the jury was not required to believe him, and it was its function, and not ours, to weigh the conflicting evidence and the inferences to be drawn therefrom. We cannot say that its verdict was without support.

Since the jury was entitled to believe that Wilson had furnished his automobile for the purpose of delivery of heroin, the evidence of Charlene's arrest and the search that followed was properly admitted against him. It is immaterial whether or not the evidence would support a finding of conspiracy between Wilson and Charlene (although we think that it would).[4] Even if Wilson is regarded only as guilty of aiding and abetting Charlene's possession for sale, it is a part of the People's case to prove the guilt of the common law principal. The evidence complained of did no more.

VI

Defendant alleges error in instructions to the jury. The instruction requested by the defendant and refused by the court was:

"The elements which the People must prove to establish the crime of possession of narcotics for sale are:

"1. Dewey Wilson must be shown to have had possession of the contraband, which means he must be shown to have exercised dominion and control over the contraband, and

"2. Dewey Wilson must be shown to have had knowledge both of the presence of the drug and of its narcotic character, and

"3. That Dewey Wilson had such dominion, control and knowledge for the purpose of selling the contraband."

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[4]For a discussion of the difference between conspiracy (requiring evidence of a prior agreement) and aiding and abetting, consult *People v. Samarjian* (1966) 240 Cal.App.2d 13. As we there pointed out, the nature of the trade in narcotics is such that the existence of a conspiracy to sell is more easily inferred than where the parties deal in goods not necessarily "contraband."

The instructions given by the court were as follows:

"Every person who possesses any narcotic such as heroin for purpose of sale is guilty of a crime.

"To constitute the illegal possession of a narcotic, the acts of dominion and control must be accompanied by knowledge on the part of the accused of (1) the presence of the narcotic object, and (2) of its narcotic nature. Unless such knowledge exists, the crime of illegal possession of a narcotic is not committed.

"The knowledge required by law may be shown by circumstantial evidence; it is manifested by the circumstances attending the possession, the manner in which it is exercised, the means used, and the sound mind and discretion of the person committing the act.

"Within the meaning of the law, a person is in possession of a narcotic when he knowingly has the narcotic under his dominion and control, and, to his knowledge, it either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him [,provided, however, that two or more persons may have joint possession of a narcotic if jointly and knowingly they have the dominion, control and exclusive possession I have described]."

Defendant argues that the wording of the case of *People v. Redrick* (1961) 55 Cal.2d 282, should have been used to formulate the instruction. "The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court." (*Francis v. City & County of San Francisco* (1955) 44 Cal.2d 335, 341.)

It is unnecessary to give an instruction where the instruction is amply covered by another instruction (see *People v. Goree* (1966) 239 Cal.App.2d 906, 916-917), and undue repetition in instructions is improper (see *People v. Bickerstaff* (1920) 46 Cal.App. 764). In the case at Bench, the instruction given fully covered the instruction requested by defendant nor can we find anything wrong with the sequence of instructions. The jury could not have been misled by being told that "every person who possesses any narcotic such as heroin for purpose of sale is guilty of a crime," where the jury was also fully instructed on the requirements of knowledge, dominion and control.

Defendant argues that there was no evidence on which to instruct on "joint possession" and therefore the instruction on joint possession was improper. In view of what we have said earlier it follows that this instruction was not error.

VII

Defendant also alleges prejudicial misconduct in the argument to the jury. It is true that the prosecutor went outside of the record by stating the value of heroin in the Orient, and he also improperly stated his personal belief as to the guilt of the defendant. However, when the defendant objected to both these errors the court sustained the objection and instructed the jury to disregard the remarks of counsel. An instruction to the jury of this type cures the error. (See, *People v. Harrington* (1957) 154 Cal.App2d 857, 860; *People v. Brice* (1957) 49 Cal.2d 434, 437.) At several other times defense counsel objected to other statements of the prosecutor but the objections were of the most general nature. Furthermore, defendant did not

make an assignment of misconduct and seek a curative instruction as he is required to do. (*People v. Hampton* (1956) 47 Cal.2d 239.) We do not believe the defendant was prejudiced by the remarks of the prosecutor.

The judgment is affirmed.

Kingsley, *J.*

We concur:

Files, *P. J.*

Jefferson, *J.*

"In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

"State of California, County of Los Angeles.

"AFFIDAVIT IN SUPPORT OF AND PETITION FOR A SEARCH WARRANT

"Personally appeared before me this 31st day of May 1963, JAMES GRENNAN, Los Angeles Police Department who, on oath, makes complaint, and deposes and says that he has and there is just, probable and reasonable cause to believe, and that he does believe, that there is now in the possession of Charline Peterson, aka, Charline Merritt on the premises located at and described as 240 West 113th Street, Los Angeles, California, a one story white frame single family residence with a garage in rear of residence, and in a vehicle described as 1962 Ford Fairlane yellow sedan, 1963 California license No. QLH 952 and on the person(s) of Charline Peterson, aka Charline Merritt the following personal property, to wit: heroin

"Facts in support of issuance of search warrant:

"Your affiant has been a police officer for 17 years and for the past 5 years has been assigned to the Narcotics Division of the Los Angeles Police Department with a primary duty of investigating narcotics activity. In his experience, he has made and assisted in making several hundred arrests for narcotics activity. Your affiant has received formal academic and informal on the job training from the Los Angeles Police Department in narcotics and has testified as an expert in the Municipal and Superior Courts of Los Angeles County regarding narcotics charges, usage and traffic several hundred times. Your affiant is the investigator in charge of this case.

"On December 26, 1962 John D. Walker who had given prior information which resulted in the recovery of heroin told your affiant that Louise Brown was selling heroin from her residence at 2033 Harcourt Street, Los Angeles, California; that said Louise Brown purchased her heroin from a female known as Charline who would deliver the heroin by automobile to the above-mentioned location; that Charline was a nurse who imported heroin by ship from the Orient every three or four months.

"On January 8, 1963 your affiant arrested said Louise Brown at the above-mentioned address and recovered heroin there; that at the time of said arrest, David Rogers was in the house; that David Rogers told your affiant that Louise Brown was buying heroin in large quantities from a girl named Charline who was a nurse; that Charline would deliver the heroin to Louise Brown by automobile to the above-mentioned location; that Charline received her heroin from a ship arriving from the Orient every three or four months; that Charline's telephone number was PL 6-0983; on January 8, 1963 said David Rogers also gave reliable information that led to the arrest of one Frank Brown on January 9, 1963 for possession of narcotics at which time narcotics were recovered.

"On March 4, 1963 an untested informant told your affiant that Louise Brown was buying heroin in large quantities from a nurse known as Charline who lived in the south part of Los Angeles and who would deliver the heroin to Louise Brown at the above-mentioned location; that Charline received her heroin by ship from the Orient every three or four months.

"On May 31, 1963 another untested informant told your affiant that this informant was buying heroin in lots of one ounce and more from Charline Peterson who would deliver the heroin by automobile; that Charline can be reached by telephone number PL 6-0983; that Charline keeps her heroin in her residence located at 240 West 113th Street, Los Angeles, California; that Charline received her heroin by ship from the Orient every three or four months and just recently received such shipment.

"Investigation by your affiant revealed that the telephone number PL 6-0983 is registered to Charline Peterson at 240 West 113th Street, Los Angeles, California.

"Investigation by your affiant revealed that the utilities at 240 West 113th Street, Los Angeles, California are registered to Charline Merritt.

"Investigation by your affiant revealed that a 1962 Ford Fairlane yellow sedan, 1963 California license No. QLH 952 is registered to Charline Peterson at 240 West 113th Street, Los Angeles, California. On several occasions, the last of which was during the latter half of May, 1963, your affiant saw the above-described car in the driveway of 240 West 113th Street, Los Angeles, California.

"That based upon the aforementioned information, facts and circumstances, your affiant has reasonable cause to believe that grounds for the issuance of a search warrant, as set forth in Section 1524 of the Penal Code, exist.

"That based upon the above facts, your affiant prays that a search warrant be issued for the seizure of said

property, or any part thereof, (at any time of the day or night, good cause being shown therefor), and that the same be brought before this magistrate or retained subject to the order of this court pursuant to Section 1536 of the Penal Code.

"James Grennan
"Affiant
"James Grennan

"Subscribed and sworn to before me this 31st day of May, 1963.

James D. Tante
Judge of the Municipal Court
Los Angeles Judicial District"